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Supreme Court of the United States

OCTOBER TERM, 1965

No. 557

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Petitioner,

—and—

ANTHONY ALBANESE,

Co-Petitioner,

—against—

N.V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent.

PETITION OF INTERNATIONAL TERMINAL OPERATING CO., INC. FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

SIDNEY A. SCHWARTZ.
Attorney for Petitioner
76 Beaver Street
New York 5, New York
212 WH 4-2633

JOSEPH ARTHUR COHEN
On Petition

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that this Court grant rehearing of its order of December 13, 1965, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed on or about September 9, 1965.

Reasons for Granting Rehearing and Issuing the Writ

1. In its revised opinion filed June 15, 1965 the United States Court of Appeals for the Second Circuit reversed, and remanded for new trial, a judgment based upon a jury verdict which awarded plaintiff, Anthony Albanese, $145,000.00 against defendant, N.V. Nederl. Amerik Stoomv. Maats., and which dismissed the latter's third-party complaint for indemnity against petitioner herein, International Terminal Operating Co., Inc. Plaintiff, Anthony Albanese, petitioned this Honorable Court for the issuance of a writ of certiorari (No. 523) as did this petitioner (No. 557).

In opposing this petitioner's petition, the respondent, N.V. Nederl. Amerik Stoomv. Maats., argued in its brief (pages 1 and 2) that a reversal and remand of the dismissal of the third-party complaint was automatically required upon reversal and remand of the judgment in favor of Albanese because "the issue of respondent's right to indemnification from the co-petitioner, third-party defendant, must be determined within the context of the proof presented upon the retrial." The action for indemnity was thus viewed by the respondent as the tail being wagged by the dog of the primary action.

This Honorable Court, in its order of December 13, 1965, granted Albanese's petition and summarily re-instated the judgment in his favor, but it denied this petitioner's petition. If reversal of Albanese's judgment required automatic reversal of the petitioner's judgment dismissing the third-party complaint, as respondent has argued, then reinstatement of Albanese's judgment should require re-

instatement of that portion of the same judgment which dismisses the third-party complaint.

Respondent conceded that there was ample proof, and for the purposes of the appeals herein it must be assumed as established fact, that the longshoremen requested the ship's mate to turn on the ship's ventilating system, the mate promised to do so, and the mate requested the longshoremen to continue working. The jury was charged that indemnity could be denied upon factual findings of (1) a complaint to a ship's officer as soon as the dangerous condition was known or should reasonably have been known by the stevedore, (2) a direction or request by the ship's officer that the longshoremen continue working, and (3) an added assurance by the ship's officer that the dangerous condition would be promptly and entirely eliminated. Obviously, in finding for Albanese against the respondent, and in denying respondent's claim for indemnity against petitioner, the jury made such fact findings. Indeed, the jury was given no other means of exonerating your petitioner. The verdict, therefore, was a symmetrical and harmonious evaluation of the conduct of the three parties to this litigation. It should not be fragmented upon appeal.

This Honorable Court has already found an absence of error in the charge relating to Albanese's action. There is a corresponding absence of error in the charge relating to the indemnity action. Rehearing should be granted, and a writ should issue, to correct appellate error and to restore a valid and consistent verdict based upon substantial evidence and a proper charge.

2. The importance of obtaining clarification from this Honorable Court of what constitutes indemnity defeating

conduct cannot be overstressed. The undersigned, who represent many stevedoring companies in the Port of New York, can attest to the many pending cases wherein realistic prognostication and evaluation are precluded by reason of the complete absence of controlling guidelines from this Court. Such a situation restricts settlements and requires more trials with resultant further conflict and confusion.

Presenting as it does the optimum of indemnity defeating conduct on the part of a shipowner as any stevedore could ever realistically hope to prove upon trial, this action makes an ideal vehicle for a comprehensive and definitive opinion by this Honorable Court in this most troublesome area of law. Indeed, the Courts themselves seek such clarification, *Misurella* v. *Isthmian Lines, Inc.*, 215 F. Supp. 857, 861, aff'd 328 F. 2d 40; and *McNamara* v. *Weichsel Dampschifffahrts*, 293 F. 2d 900, 903.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Second Circuit.

December 28, 1965

Respectfully submitted,

SIDNEY A. SCHWARTZ
Attorney for Petitioner

JOSEPH ARTHUR COHEN
On Petition

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

SIDNEY A. SCHWARTZ
Attorney for Petitioner

Certificate of Service

This is to certify that on the 3rd day of January, 1966, copies of the above petition have been mailed to:

Edmund F. Lamb, attorney for N.V. Nederl. Amerik Stoomv. Maats., at his office: 80 Broad Street, New York, New York 10004; and to

Philip F. DiCostanzo, attorney for Anthony Albanese, at his office: 66 Court Street, Brooklyn, New York 11201.

SIDNEY A. SCHWARTZ